Supreme Court, U.S.
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No. 96-1929

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DONALD GREEN,

Petitioner,

v.

PHILADELPHIA HOUSING AUTHORITY; WILLIAM BERGMAN, INTERIM CHIEF OF POLICE; DANIEL ROSENSTEIN, CAPTAIN; JOHN CRESCI, DEPUTY CHIEF, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS OFFICIALS OF THE PHILADELPHIA HOUSING AUTHORITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Contrary to what the petitioner asserts in his petition (Pet. Cert., n. 6 p. 12), the acting chief of police of The Philadelphia Housing Authority Police Department ("PHAPD"), Respondent William Bergman, testified on direct examination during the petitioner's case in chief that it was upon the concern and recommendation of the captain of the PHAPD Drug Elimination Task Force ("DETF") unit that it would be "right for the organization" to remove the petitioner from the DETF unit "until this matter was resolved." Respondent Bergman also testified that DETF was a special unit that worked in conjunction with the Attorney General's Office of Pennsylvania, Pennsylvania State Police, the Philadelphia Police Department, U. S. Customs, the U. S. Drug Enforcement Agency, and sometimes the Federal Bureau of Investigation, "in stamping out large drug operations," such as mob-related criminal activity. He testified that one of the purposes for PHA having a DETF unit was "to work on . . . the image of what the Philadelphia Housing Authority Police Department wanted to become." He testified that PHAPD was looking for "officers that were to some extent more aggressive, to some extent officers that really could *interrelate with other organizations* and *really show these other organizations that this was a police department that was really top notch and [a] very, very good operation.*"

Later, on direct examination during the petitioner's case in chief, Respondent Daniel Rosenstein, PHAPD captain of the DETF unit, testified that the type of officer he was looking for to be a part of the unit was *"[o]ne whose background did not raise questions as to their sincerity and integrity,"* and "[o]ne who obviously was drug free *and did not associate with people in the drug world."* Respondent Rosenstein further testified about the security of operations in the building where the DETF unit was stationed. He explained the necessity to maintain a

secure environment because of, among other reasons, the presence of undercover law enforcement officers from the various law enforcement organizations and informants working together in the building.

Respondent Bergman also testified about his authority to transfer the petitioner. He testified that, under the collective bargaining agreement, management had the authority to direct the work force, including transferring personnel from unit to unit. The collective bargaining agreement, he testified, did not provide for any special status given to persons assigned to a special unit, such as DETF. Nor did the agreement provide for special pay to officers assigned to a unit such as DETF. The testimony and evidence adduced at trial showed that the petitioner's status as a PHAPD police officer did not change as a result of his transfer to patrol duty. He did not lose pay, he continued to wear the uniform of a PHAPD police officer, and he was permitted to continue to perform his duties as a full-fledged police officer.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT BELOW DOES NOT DIRECTLY CONFLICT WITH THE ANALYSIS OF THREE OTHER CIRCUITS OR DISREGARD SETTLED SUPREME COURT PRECEDENT.

In *Waters v. Churchill*, this Court reiterated the longstanding principle of when speech by a government employee is protected by the First Amendment:

> To be protected, the speech must be on a matter of public concern, and the employee's interest in

> expressing herself on this matter must not be outweighed by any injury the speech could cause to "'the interest of the State, *as an employer*, in promoting the efficiency of the public services it performs through its employees.'" [Citations omitted.]

Waters v. Churchill, 511 U. S. 661, 668 (1994) (emphasis added). Determining whether or not a government employee's speech is protected by the First Amendment is a question that must be answered on a case-by-case basis, turning on "the particular context in which the question arises . . . ." *Id.* at 671.

This Court has assumed and continues to assume that "the government must be able to restrict its employees' speech." *Id.* at 672. It is as an employer that governments enjoy far broader powers in restricting speech. Among those reasons is the potential for disruption. As the majority held in *Waters*:

> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. . . . But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.
>
> . . . [W]here the government is acting as employer, its efficiency concerns should, as we discussed above, be assigned a greater value.

Id. at 675. Government employers should not be fearful of using personnel procedures that differ from the rules of

evidence used by courts; this, the law does not require. *Id.* at 676-677. What the law requires is that the government employer's personnel decision be reasonable. *See Id.* at 677-680 (reasonableness standard discussed).

The Third Circuit's analysis of the petitioner's speech activity followed this Court's holding in *Waters*, as well as *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205, Will County*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). To claim that the decision below is "dangerously at odds with *Waters v. Churchill*" is hyperbole. To the contrary, the Third Circuit followed the guidance and principles set forth in *Waters*, keeping within the spirit of this Court's acknowledgment of the complexity in balancing First Amendment activity against a government's interest as employer. The Third Circuit carved out no new analysis when it held that "*under the facts of this case* any pretext is irrelevant." Pet. Cert. App., p. 20a. Rather, in so holding, the Third Circuit explained why pretext was not relevant, correctly relying on this Court's reasoning in *Waters*. Pet. Cert. App., n. 9 p. 20a.

That the Third Circuit's decision directly conflicts with the analysis of three other circuits ignores the *context* component of the *Pickering* balance. This case involved the transfer of a police officer from a special drug elimination unit to a patrol unit, after learning that the officer had appeared on behalf of a reputed associate of the so-called Stanfa Crime Family. *Sheppard v. Beerman* (2d Cir.) involved the discharge of a law clerk, *Jeffries v. Harleston* (2d Cir.) involved limiting a college professor's term as chairman of the Black Studies department, *Gardetto v. Mason* (10th Cir.) involved the demotion and suspension of a college counselor, and *Dunn v. Carroll* (8th Cir.) involved the discharge of a fire fighter. Pet. Cert., pp. 9-10. Each of those cases was decided in a

substantially different employment context from the one in this matter. The type of work and the disruption perceived in those cases cannot be fairly compared with the type of work performed by a special police unit that works with other law enforcement agencies in combating drug-related criminal activity. Under *Pickering*, *Connick* and *Waters*, the court must give deference to the type of government employment being scrutinized. Ample evidence at trial supported and justified the respondents' decision to transfer the petitioner out of DETF, despite his appearance at the bail hearing. The reasons given were reasonable and the significant deference given by the courts below to the respondents' employment decision was consistent with this Court's analysis in *Waters*. The Third Circuit simply did not carve out a new standard based on a government employer's objective belief that the speech was potentially disruptive. Rather, the Third Circuit deferred to the wisdom of not requiring a police department to wait for instances of actual disruption before transferring an employee to another unit within the department.

II. UNDER THE FACTS AND RULINGS OF THE LOWER COURTS IN THIS CASE, CERTIORARI SHOULD NOT BE GRANTED "TO DECIDE THE IMPORTANT QUESTION WHETHER THE CAUSE OF ACTION CREATED BY THE CIVIL RIGHTS ACT, 42 U.S.C. § 1985(2), FOR CONSPIRACIES TO INJURE WITNESSES IN FEDERAL COURT PROCEEDINGS, SHOULD BE LIMITED IN ANY MANNER BY CONSIDERATION OF THE GOVERNMENT'S ASSERTED INTERESTS IN PREVENTING DISRUPTION CAUSED BY THE TESTIMONY IN COURT."

The respondents fail to see how the Third Circuit and Federal District Courts' decisions impermissibly limited the petitioner's claim brought under 42 U.S.C. § 1985(2). Reliance on *Kush v. Rutledge* as support for this argument is, therefore, misplaced.

The Third Circuit affirmed the District Court's dismissal of this claim because the underlying act--transfer of the petitioner from the DETF unit to patrol after learning the petitioner had appeared at a bail hearing on behalf of a reputed mob associate--was not unlawful. Pet. App., p. 18a. The Court affirmed also on the basis of the District Court's reasons. Pet. Cert. App., p. 18a. Common sense and logic require that, if the underlying act for which one claims is evidence of a conspiracy is not unlawful, then the co-conspirators cannot otherwise be liable simply because they may have acted together. See, Pet. Cert. App., p. 44a.

It is noteworthy that, in dismissing this claim, the District Court considered the respondents' claims of qualified immunity *and* the petitioner's points for charge on the conspiracy claim. Id. The petitioner "set forth in his points for charge that a conspiracy occurs when two or more persons reach an understanding to reach an unlawful purpose." Id. The District Court ruled that the transfer was lawful and that the respondents were qualifiedly immune. Id.; see also, Pet. App., pp. 41a-44a (District Court's ruling and discussion on qualified immunity).

The District Court also ruled that the petitioner had not offered sufficient evidence of injury as a result of his reassignment or transfer. Pet. App., pp. 44a-45a. Injury is an element of a § 1985(2) claim in the first part. *See, Kush v. Rutledge*, 460 U.S. 719, 723 n. 4 (1983). The District Court reasoned that the evidence presented by the petitioner on injury

was "too speculative for the Court to put to the jury on both the basis upon which [the petitioner] might be entitled to overtime and factoring in the precise stipulation of the actual experience." Pet. Cert. App., pp. 45a-46a. Without proof of injury as a result of his transfer, the petitioner's claim under § 1985(2) must fail.

The Third Circuit's affirmance of the District Court's dismissal of this claim did not constitute an impermissible limitation on a cause of action under 42 U.S.C. § 1985(2).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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